



FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

William J. Olson
William J. Olson, P.C.
370 Maple Ave. West, Suite 4
Vienna, VA 22180-5615

JUL 11 2017

RE: MUR 7004
The 2016 Committee
John Philip Sousa IV


Dear Mr. Olson:

On February 5, 2016, the Federal Election Commission notified your clients, The 2016 Committee and William Saracino in his official capacity as treasurer and John Phillip Sousa IV, of a complaint alleging violations of the Federal Election Campaign Act of 1971, as amended. On June 21, 2017, the Commission found, on the basis of the information in the complaint and your response, that there is no reason to believe that The 2016 Committee and Mr. Sousa violated 52 U.S.C. § 30124(b)(2) and 11 C.F.R. § 110.16(b)(2), and dismissed the allegation that The 2016 Committee violated 52 U.S.C. § 30120(a) and 11 C.F.R. § 110.11(a). Accordingly, the Commission closed its file in this matter.

Documents related to the case will be placed on the public record within 30 days. *See* Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003) and Statement of Policy Regarding Placing First General Counsel's Reports on the Public Record, 74 Fed. Reg. 66,132 (Dec. 14, 2009). The Factual and Legal Analysis, which explains the Commission's findings, is enclosed for your information.

If you have any questions, please contact Claudio J. Pavia, the attorney assigned to this matter at (202) 694-1597.

Sincerely,


Peter Reynolds
Attorney

Enclosure
Factual and Legal Analysis

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**FEDERAL ELECTION COMMISSION
FACTUAL AND LEGAL ANALYSIS**

Respondents: The 2016 Committee and William Saracino MUR: 7004
 in his official capacity as treasurer
 John Philip Sousa IV
 Ron Robinson

I. INTRODUCTION

This matter was generated by a Complaint filed with the Federal Election Commission by Elihu Eli El, alleging that The 2016 Committee and its treasurer (the "Committee"), an independent-expenditure-only political committee, and Committee officials John Philip Sousa IV and Ron Robinson, violated the Federal Election Campaign Act of 1971, as amended (the "Act") by: (1) failing to disclose that they were not authorized by any candidate or candidate's committee; and (2) misrepresenting themselves as acting on behalf of a candidate or candidate's committee for the purpose of soliciting contributions. For the reasons stated below, the Commission dismisses the allegation that the Committee violated 52 U.S.C. § 30120(a) and 11 C.F.R. § 110.11(a), and finds no reason to believe that the Respondents violated 52 U.S.C. § 30124(b)(2) and 11 C.F.R. § 110.16(b)(2).

II. FACTS

The 2016 Committee is an independent-expenditure-only political committee that supported Dr. Ben Carson's candidacy for the 2016 Republican presidential nomination.¹ It is affiliated with The 2016 Draft Committee, which began its existence as the National Draft Ben Carson for President Committee, but changed its name after Carson become a candidate.² At the

¹ See Committee & Sousa IV Resp. at 2-3 n.4 (Feb. 25, 2016).

² *Id.*; see Committee & Sousa IV Resp. at 5; 52 U.S.C. § 30102(e)(4).

1 relevant times, John Philip Sousa IV was the Committee's National Chairman and Ron Robinson
2 was its National Digital Director.³

3 Complainant states that he made a \$100 contribution in the belief that he was donating to
4 Carson's presidential campaign, and speculates that "most donors" were similarly misled.⁴
5 Complainant alleges that the Respondents "have not adequately disclosed to potential donors that
6 they are acting as a political action committee" and "have used misleading publications and
7 advertisement[s] to misrepresent themselves as an official campaign fundraising entity [of
8 Carson's presidential campaign]."⁵

9 The allegations arise out of four documents attached to the Complaint.⁶

- 10 • *Screenshot of the Committee's Website.*⁷ The Complaint alleges that the Committee's
11 website "fools" viewers into believing that it is Carson's official campaign website.⁸ The
12 webpage header states "Welcome to Win Ben Win – South Page," and there are two
13 logos with "Win Ben Win!" in large font and "The 2016 Committee" underneath in
14 smaller font. The page lists the titles and contact information of individuals who were
15 apparently part of the Committee's effort to organize in the South. Although the
16 screenshot supplied with the Complaint does not show the entire webpage, an archived
17 version includes a boxed disclaimer stating that the webpage was "Paid for by The 2016
18 Committee," and that it was "Not authorized by any candidate or candidate's
19 committee."⁹ The Committee's street address, telephone number, and email address were

³ Committee & Sousa IV Resp. at 1 n.1; Compl., Ex. at 22 (Feb. 1, 2016).

⁴ Compl. at 1; *see id.*, Ex. at 13-15 (email from Complainant to individuals associated with the Committee in which Complainant offered recommendations he intended to be received by Carson and his official campaign).

⁵ Compl. at 1.

⁶ There are other attached documents besides the four highlighted in this Report. Those items, however, are relevant to an additional claim, unrelated to the Act, that Committee representatives "caused turmoil" at Complainant's workplace. *Id.*, Ex. at 25. This alleged activity is beyond the Commission's jurisdiction.

⁷ *Id.* at 10-12.

⁸ *Id.* at 9.

⁹ THE 2016 COMMITTEE., <https://web.archive.org/web/20150811000851/http://www.2016committee.org/> (archived version from August 11, 2015).

1 listed directly above that box. The Response confirms that such a disclaimer is displayed
2 on the website.¹⁰
3

- 4 • *August 12, 2015 Email.*¹¹ The email, sent by Sousa IV, solicited contributions to
5 Committee and advocated for Carson's election. He signed the email as Chairman of The
6 2016 Committee. At the top was a banner consisting of Carson's image and a "Win Ben
7 Win!" logo, similar to the logos on the Committee's website, except that it also provided
8 the Committee's website URL. At the bottom was a boxed disclaimer which stated,
9 "Paid for by The 2016 Committee," "Not authorized by any candidate or candidate's
10 committee," and "Formerly the National Draft Ben Carson for President Committee."
11 The disclaimer did not include the Committee's address, telephone number, or website.
12
- 13 • *September 16, 2015 Email Receipt.*¹² The automated email was sent by the Committee to
14 Complainant in acknowledgement of his \$100 contribution. The top portion is a message
15 from Sousa IV thanking Complainant for his contribution and describing how the
16 contribution will assist with efforts to elect Carson as president. Sousa IV signed as
17 "2016 Committee Chairman," and provided his phone number "to call me personally
18 should you have any questions." The middle portion, which was in a box to separate it
19 from the rest of the message, contained the Committee's name in larger print and
20 information relevant to the contribution, including Complainant's identifying information
21 and contribution amount. The bottom portion repeated the Committee's name and listed
22 its street address, but there was no statement regarding who paid for the email or whether
23 it was authorized by any candidate or candidate's committee.
24
- 25 • *November 17, 2015 Email.*¹³ Even though Sousa IV's name and the Committee's website
26 URL appeared in the "From" field, the email actually was sent by Carson's authorized
27 committee, Carson America, using the Committee's email list on a rental basis.¹⁴ At the
28 bottom, a boxed disclaimer stated, "Paid for by Carson America, Inc." A short preamble
29 from Sousa IV stated, "I'm forwarding you an urgent message from Ben Carson that I
30 thought would be of interest to you." Directly above the preamble text was the same
31 banner and logo as in the Committee's August 12, 2015, email. Below the preamble,
32 separated by a thin line, was an email written by Carson sandwiched between his
33 committee's logo and a large button to donate to his campaign.

¹⁰ Committee & Sousa IV Resp. at 5.

¹¹ Compl., Ex. at 2-5.

¹² *Id.* at 7-8.

¹³ Compl., Parts 1-3.

¹⁴ *Id.*, Part 1 ("John Philip Sousa IV (The 2016 Committee) <john@2016committee.org>"); Committee & Sousa IV Resp. at 3 n.5. The Response explains that the email "contain[ed] transmittal information from the list owners at the outset, in accordance with professional fundraising standards and the practices" to prevent the email from ending up in recipients' spam folders. Committee & Sousa IV Resp. at 3 n.5.

1 The Respondents assert that the communications at issue contain adequate disclaimers
2 and “nothing in the [attached] documents . . . would reasonably support the notion that . . .
3 [Complainant’s] subjective belief [about the Committee] was the result of fraudulent
4 misrepresentations.”¹⁵ They claim that “[t]he very documents attached to the complaint reveal
5 that The 2016 Committee complied with the FECA and FEC regulations.”¹⁶ Furthermore, as
6 mentioned above, the Respondents maintain that “[a]t all pertinent times” the website contained
7 an adequate disclaimer that “clearly and unambiguously disclosed” the Committee’s identity and
8 clearly described its independence from the candidate and his official campaign.¹⁷ Further, the
9 website described the Committee as “the successor to the National Draft Ben Carson for
10 President Committee,” and explained that the Committee removed Carson’s name from its title
11 pursuant to the Commission’s regulations.¹⁸

12 **III. LEGAL ANALYSIS**

13 **A. Disclaimers**

14 Email of more than 500 substantially similar communications, when sent by a political
15 committee, and all Internet websites of a political committee that are available to the general
16 public, must include disclaimers.¹⁹ For communications not authorized by a candidate, the
17 candidate’s authorized committee, or an agent of either, the disclaimers shall clearly state: (1) the
18 name and permanent street address, telephone number, or website of the committee; and (2) that

¹⁵ Committee & Sousa IV Resp. at 4.

¹⁶ *Id.*

¹⁷ *Id.* at 5.

¹⁸ *Id.*

¹⁹ 11 C.F.R. § 110.11(a)(1); *see* 52 U.S.C. § 30120(a).

1 the communication is not authorized by a candidate or candidate's committee.²⁰ Moreover, the
2 disclaimers "must be presented in a clear and conspicuous manner."²¹ "A disclaimer is not clear
3 and conspicuous if it is difficult to read . . . or if the placement is easily overlooked."²²

4 *Screenshot of the Committee's Website.* The website apparently included an adequate
5 disclaimer. It identified the Committee as the payor, stated that the website was not authorized
6 by any candidate or candidate's committee, and listed the Committee's street address, telephone
7 number, and email address. Moreover, the text of the disclaimer was conspicuous and easily
8 readable.

9 *August 12, 2015 Email.* This email included a disclaimer with most, but not all, of the
10 required information.²³ Importantly, the disclaimer identified the Committee as the payor and
11 stated that the email was not authorized by any candidate or candidate's committee, but it did not
12 list the Committee's street address, telephone number, or website. However, the URL of the
13 Committee's website was shown in a logo contained in the email, and the URL could also be
14 seen in the "From" field which displayed, "John Philip Sousa IV (The 2016 Committee)
15 john@2016committee.org."

16 *September 16, 2015 Email Receipt.* This email did not include a disclaimer, but it
17 otherwise provided some of the required information.²⁴ Sousa IV signed as "2016 Committee

²⁰ 52 U.S.C. § 30120(a)(3); 11 C.F.R. § 110.11(b)(3).

²¹ 11 C.F.R. § 110.11(c)(1).

²² *Id.*

²³ Compl., Ex. at 1-5. There is no information regarding the size of the Committee's email list. However, because there were nearly 4,500 individuals who made an itemized contribution during the 2016 election cycle prior to this email, it is plausible that there were at least 500 people on the list. *See* The 2016 Committee 2015 Year-End Rpt. (Jan. 31, 2016); The 2016 Committee Amended 2015 Mid-Year Rpt. (Feb. 26, 2016).

²⁴ Compl., Ex. 6-8. There is no information regarding the number of contributors who received a similar email receipt. However, because the Committee reported over 11,000 itemized contributions during the 2016

1 Chairman,” thereby indicating that the Committee was responsible for the email, and the
2 Committee’s name and address were listed at the bottom. Although there was no statement that
3 the Committee paid for the communication or that it was not authorized by any candidate or
4 candidate’s committee, it is likely that recipients would have nonetheless understood this to have
5 been the case. Because the email was sent in response to a contribution, recipients would have
6 likely visited the Committee’s website or received emails from the Committee. As described
7 above, the website included adequate disclaimers and information distinguishing the Committee
8 from Carson’s official presidential campaign, and some of the attached emails contained at least
9 partially adequate disclaimers stating that the Committee was not authorized.

10 *November 17, 2015 Email.* At the top of an email sent by Carson America using the
11 Committee’s email list on a rental basis, appeared a short message written by Sousa IV on behalf
12 of the Committee. This introductory greeting — “I’m forwarding you an urgent message from
13 Ben Carson that I thought would be of interest to you.” — did not include a disclaimer, but there
14 was a disclaimer at the bottom referring to the portion of the email attributed to Carson
15 America.²⁵ Without any other information, a recipient might have reasonably assumed that
16 Carson’s committee was responsible for the entire email, and that Carson or someone working
17 for his committee gave Sousa IV the message.

18 Although the email’s disclaimer identified Carson America as the sender, while including
19 a preamble by Sousa IV on behalf of the Committee, the likelihood of any confusion was
20 minimal. The short preamble simply explained why an email from Carson was being transmitted
21 through the Committee’s email list. Moreover, there was no solicitation on behalf of the

election cycle prior to this receipt, it is plausible there were at least 500 such recipients. *See* The 2016 Committee 2015 Year-End Rpt. (Jan. 31, 2016); The 2016 Committee Amended 2015 Mid-Year Rpt. (Feb. 26, 2016).

²⁵ *See* Compl., Ex. at Part 1.

1 Committee. Furthermore, because the email was sent to the Committee's email list, recipients
2 would have likely received preceding and subsequent emails with disclaimers and other relevant
3 background information about the Committee, distinguishing it from Carson America.

4 In conclusion, the Committee's website included an adequate disclaimer, and the
5 Committee's emails included partially adequate disclaimers or were missing disclaimers.
6 However, with respect to the emails lacking full disclaimers, there was sufficient information for
7 recipients to understand that the Committee paid for the emails and was not authorized by any
8 candidate or candidate's committee.²⁶ Therefore, the Commission dismisses the allegation that
9 the Committee violated 52 U.S.C. § 30120(a) and 11 C.F.R. § 110.11(a), pursuant to *Heckler v.*
10 *Chaney*, 470 U.S. 821 (1985).

11 **B. Fraudulent Misrepresentation**

12 The Act provides that "[n]o person shall fraudulently misrepresent the person as
13 speaking, writing, or otherwise acting for or on behalf of any candidate or employee or agent
14 thereof for the purpose of soliciting contributions or donations."²⁷ Further, "[n]o person shall . . .
15 willfully and knowingly participate in or conspire to participate in any plan, scheme or design to

²⁶ The Commission has dismissed similar allegations where communications were unlikely to mislead, based on the contents of the communications at issue or the contents in other communications sent to the same recipients. *See, e.g.*, MUR 6835 (Lesli Good for Congress) (dismissing allegation that a committee's mailer failed to include a disclaimer where the committee included proper disclaimers on other mailers, and the mailer at issue contained some identifying information); MUR 6814 (Erin Bilbray for Congress, *et al.*) (dismissing allegation that committee failed to include adequate disclaimers in an email where the correspondence was "unlikely to have misled the public recipients due to the identifying information included in the email"); MURs 6799 & 6842 (Frank Scaturro for Congress, *et al.*) (same); MUR 6438 (Arthur Robinson for Congress) (same).

²⁷ 52 U.S.C. § 30124(b)(1); 11 C.F.R. § 110.16(b)(1). The Commission has identified various types of conduct that may support a reason to believe finding. *E.g.*, Factual & Legal Analysis ("F&LA") at 5-6, MUR 6531 (Obama-Biden 2012) (operating under candidate's name, and placing candidate's official logo on website and merchandise); F&LA at 2-4, MUR 5495 (johnferry-2004.com) (using a false disclaimer, and making statements that appeared to have been made on behalf of the candidate); F&LA at 5, MUR 5472 (Republican Victory Committee) (making statements that appear to imply that contributions would be directed to the party committee). Each of those examples evinces some kind of intent on the part of the Respondent. Also relevant is evidence showing that contributors have in fact been misled by the communications at issue. *See* F&LA at 10, MUR 5951 (Californians for Change).

1 violate” this provision.²⁸ The Act requires that the violator have the intent to deceive, but does
2 not require proof of the common law fraud elements of justifiable reliance and damages.²⁹
3 Additionally, “[e]ven absent an express misrepresentation, a scheme devised with the intent to
4 defraud is deemed a fraud under the Act and the Commission’s regulations if it was reasonably
5 calculated to deceive persons of ordinary prudence and comprehension.”³⁰

6 There is nothing in the record tending to suggest that the Respondents misrepresented
7 themselves (or intended to misrepresent themselves) as acting on behalf of Carson or his
8 authorized committee. First, the “Who We Are” section of Committee’s website clearly
9 explained that the Committee is the successor to the National Draft Ben Carson for President
10 Committee, and that, in order to comply with Commission regulations, the draft committee could
11 no longer use Carson’s name when he became a candidate. Second, the Committee’s emails and
12 the screenshot of the Committee’s website do not contain any statements purportedly made by or
13 on behalf of the candidate.³¹ Third, the Committee’s communications, other than the September
14 16, 2015, email receipt, specifically stated that the Committee was not authorized by any

²⁸ 52 U.S.C. § 30124(b)(2); *see also* 11 C.F.R. § 110.16(b)(2).

²⁹ First Gen. Counsel’s Rpt. at 4, MUR 6868 (Vincent Harris); F&LA at 4, MUR 5472 (Republican Victory Committee, Inc., *et al.*); *see* Disclaimers, Fraudulent Solicitation, Civil Penalties, and Person Use of Campaign Funds, 67 Fed. Reg. 76,962, 76,969 (Dec. 13, 2002) (Explanation & Justification) (citing *Neder v. United States*, 527 U.S. 1, 24-25 (1999)).

³⁰ F&LA at 4, MUR 6531 (Obama-Biden 2012); *see United States v. Thomas*, 377 F.3d 232, 242 (2d Cir. 2004); *FEC v. Novacek*, 739 F. Supp. 2d 957, 961 (N.D. Tex. 2010) (finding that defendants knowingly and willfully violated 2 U.S.C. § 441h(b) (now 52 U.S.C. § 30124(b))); *see also* F&LA at 9, MUR 5951 (Californians for Change).

³¹ As noted above, Sousa IV wrote a preamble on behalf of the Committee that appeared at the top of the November 17, 2015 email paid for by Carson’s authorized committee, using the Committee’s email list on a rental basis. It appears this preamble was intended to explain why members of the Committee’s email list were receiving a message from Carson’s committee, and not an attempt to misrepresent that Sousa IV or the Committee were working for Carson or his committee. And, importantly, the preamble did not solicit contributions on behalf of the Committee.

1 candidate or candidate's committee.³² Fourth, the communications clearly identified the
2 Committee as distinct from the candidate and his official campaign. One email states that the
3 Committee's "primary focus" was to provide a biography of Carson written by Sousa IV to
4 prospective Republican voters.³³ Although Complainant maintains that he was personally misled
5 into believing that the Respondents were acting on behalf of Carson or his authorized committee,
6 the information in the record does not support a reasonable inference that Respondents intended
7 to cause such confusion.

8 Therefore, the Commission finds no reason to believe that the Committee, Sousa IV, or
9 Robinson violated 52 U.S.C. § 30124(b)(2) and 11 C.F.R. § 110.16(b)(2), and closes the file in
10 this matter.

³² See F&LA at 10, MUR 6641 (CAPE PAC) (explaining that an adequate disclaimer "can defeat an inference that a respondent maintained the requisite intent to deceive for purposes of a [52 U.S.C. § 30124] violation"). The fact that some of the disclaimers were apparently less than adequate does not undermine their value as evidence to show a lack of intent with respect to a fraudulent misrepresentation claim. F&LA at 11, MUR 6633 (Republican Majority Campaign PAC) (concluding that inadequate disclaimers may still indicate that the respondent committee did not fraudulently misrepresent itself as acting on behalf of a candidate); *but see* F&LA at 4 n.2, MUR 5472 (Jody Novacek) (explaining that the presence of a disclaimer does not automatically negate intent).

³³ Compl., Ex. at 3.